

- (1) Whether or not claimant is entitled to any future medical treatment at the expense of the respondent's insurance carrier.
- (2) Whether or not claimant is entitled to be paid the sum of \$350 by the respondent and insurance carrier as an unauthorized medical allowance.

- (3) Nature and extent of the disability.
- (4) Compensation due.

In their Brief in Support of Application for Review and during oral argument the respondent and insurance carrier also raised two additional issues: First, whether the parties' stipulation to claimant having suffered a 12 percent functional impairment to the body as a whole included a stipulation that the functional impairment was as a result of his right shoulder injury alleged to have been sustained by way of a series of accidents ending April 30, 1992; and second, whether claimant is entitled to any benefits other than medical compensation as he was not disabled for a period of at least one week as provided in K.S.A. 1991 Supp. 44-501(c).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and arguments of the parties, the Appeals Board finds as follows:

We will first address the two issues respondent raises for the first time on appeal. The claimant's functional impairment and whether K.S.A. 1991 Supp. 44-501(c) bars any claim for benefits beyond medical compensation were not issues raised before the Administrative Law Judge. As a general rule the Appeals Board will not consider issues raised for the first time on appeal. Review by the Appeals Board is limited to questions of law and fact as provided and shown by the transcript of evidence as presented and introduced before the administrative law judge. See K.S.A. 1995 Supp. 44-555c(a); Scammahorn v. Gibraltar Savings & Loan Assn., 197 Kan. 410, 416 P. 2d 771 (1966).

With regard to the stipulation to functional impairment, respondent now contends that its stipulation to a 12 percent functional impairment to the body as a whole did not include a stipulation that any portion of that functional impairment was a result of the accident or injury which is the subject of this claim. A review of the record reveals no such condition being placed upon the stipulation. If it was respondent's intent to reserve the question of causation as to the stipulated percentage of functional impairment, such was not made known at the time the stipulations were taken before the Administrative Law Judge. Furthermore, stipulating to a percentage of functional impairment without stipulating to that functional impairment being the result of the accident alleged to have caused such impairment seems pointless in this case. The purpose of such a stipulation is to narrow the issues, limit the evidence needed in the trial of the case and otherwise alert the claimant that causation is at issue. A stipulation to the percentage of impairment that does not include a stipulation that the impairment is due to the subject accident does not serve this purpose since the opinion testimony of the expert witness who issued the functional impairment rating would still be needed to establish that the rating given was due to the injury alleged.

It is not always the case that the issue of nature and extent of disability is intended to encompass the question of whether any portion of the permanent injury stems from the admittedly work-related accident. Therefore, absent a clear expression of intent to the contrary, the Appeals Board finds that it is implicit within a stipulation as to functional impairment that the impairment so stipulated is the result of the accident alleged, as opposed to some other cause.

- (1) Future medical treatment should be awarded only upon proper application to and approval of the Director.
- (2) Claimant is entitled to an unauthorized medical allowance up to the statutory maximum upon presentation of itemized statements for such services.

(3)(4) Because his is a "nonscheduled" injury, benefits are determined based upon K.S.A. 1991 Supp. 44-510e which provides in part:

"The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the ability of the employee to perform work in the open labor market and to earn comparable wages has been reduced, taking into consideration the employee's education, training, experience and capacity for rehabilitation, except that in any event the extent of permanent partial general disability shall not be less than [the] percentage of functional impairment."

The Appeals Board finds that the claimant suffered a permanent aggravation of his condition subsequent to his employment with the respondent. The record does not disclose the extent to which his present disability is related to his employment with the respondent as opposed to the subsequent intervening accidents. As such, claimant has not met his burden of proving the extent of his disability in excess of his functional impairment which arose out of and in the course of his employment with the respondent. His permanent partial general disability is, therefore, limited to the stipulated 12 percent impairment of function.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Alvin E. Witwer dated December 15, 1995 should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, William D. Lutjen, and against the respondent, Schell-Firebaugh, Inc., and its insurance carrier, CNA Insurance, for an accidental injury which occurred April 30, 1992.

Claimant is entitled to 6.71 weeks of temporary total disability compensation at the weekly rate of \$289.00 in the sum of \$1,939.19, followed by 408.29 weeks at the rate of \$75.22 per week or \$30,711.57, for a total award of \$32,650.76.

As of April 12, 1996, there is due and owing claimant 6.71 weeks of temporary total disability compensation at the weekly rate of \$289.00 in the sum of \$1,939.19, followed by 199.43 weeks of compensation at the rate of \$75.22 per week or \$15,001.12, for a total of \$16,940.31 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of \$15,710.45 is to be paid for 208.86 weeks at the rate of \$75.22 per week, until fully paid or further order of the Director.

All other orders of the Administrative Law Judge are hereby adopted by the Appeals Board to the extent they are not inconsistent with the findings and conclusions made herein.

IT IS SO ORDERED.

Dated this ____ day of April 1996.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

- c: William W. Hutton, Kansas City, KS
Anton C. Andersen, Kansas City, KS
Alvin E. Witwer, Administrative Law Judge
Philip S. Harness, Director